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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PATSY A. TUCKER—*Petitioner*

VS.

STATE OF MONTANA EX REL,
MIKE MCGRATH, ATTORNEY GENERAL,
AND JANIE MCNAIR A/K/A CLYSTA JANIE
MCNAIR, RESIDENT OF LIBBY, MONTANA—
Respondents

On Petition For A Writ Of Certiorari
To The Supreme Court
Of The State Of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether failure to prosecute negligent homicides in cases of drivers impaired by conditions other than alcohol or drugs is a violation of equal protection and due process under the 14th Amendment of the United States Constitution.

2. Whether the private attorney general doctrine may be extended to compel criminal prosecution or appointment of a special prosecutor in light of the unequal prosecution of negligent homicides caused by drivers impaired by alcohol or drugs and by drivers impaired by other conditions.

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Patsy A. Tucker (Tucker) respectfully submits this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Montana.

OPINIONS BELOW

The Montana Supreme Court opinion is reported at 2008 MT 454N (2008). The opinion is unpublished but the case title, Montana Supreme Court cause number, and disposition are included in the court's quarterly list of noncitable cases and electronically at 2008 WL 5413147 (2008). The opinion is included in Appendix A.

JURISDICTION

This Court has jurisdiction to review the memorandum decision of the Montana Supreme Court pursuant to 28 U.S.C. § 1257(a). The Montana Supreme Court filed its opinion on December 30, 2008.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Pursuant to Rule 14(f) of the Supreme Court Rules, the citations of relevant constitutional and statutory provisions are listed here.

14th Amendment to the United States Constitution
Mont. Code Ann. § 45-1-205
Mont. Code Ann. § 45-5-104
Mont. Code Ann. § 61-8-401(3)(a).

STATEMENT OF THE CASE

Overview

Facts Relating to the Death of Cady Tucker

Unprosecuted Death of a Child

The brutal killing of Cathryn Claire Rose Tucker ("Cady") Tucker, age 11, on August 15, 2002, by Respondent Janie McNair (McNair) in Missoula County, Montana, was not prosecuted as a crime in Montana. McNair's alleged impairment was caused by uncontrolled insulin-dependent diabetes rather than by driving under the influence,[1] which is prosecuted at a higher rate in Montana and other states. Petitioner Tucker is the mother of Cady.

McNair was determined to be solely at fault by the Montana Highway Patrol (MHP) in its September 30, 2002, Fatal Crash Investigation Report of the three-car crash that caused Cady's death. (Tucker 12/16/07 district court brief)

McNair's Medical History

McNair is a severe-insulin dependent Type 2 diabetic with a long history of extended periods of uncontrolled blood sugar. During the few days before the fatal crash, her blood sugars required an emergency room (ER) visit, where she had a reading of 541 mg/dL (nearly five and one-half times the normal limit). The instructions of Dr. Jane Borish,

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[1] For the purposes of this writ, "influence" means both alcohol and drugs: Montana Code Annotated (MCA) § 61-8-401(3)(a) "Under the influence" means that as a result of taking into the body alcohol, drugs, or any combination of alcohol and drugs, a person's ability to safely operate a vehicle has been diminished.

the ER physician who saw McNair, for someone with blood glucose higher than 500 include a warning that the patient avoid driving. A week before the crash, McNair saw a diabetic specialist, who told McNair that her diabetes was "in terrible control and needs to improve rapidly." McNair's A1C hemoglobin level, which is a two- to three-month hourly average blood sugar level, was approximately 360 (about three and one-half times the normal limit). A diabetic authority and physician in Idaho Falls who reviewed the medical records stated that the "patient is irresponsibly out of control to an extreme degree." During this time, McNair was warned by her doctor "to monitor her sugars very closely." Minimal care for an insulin-dependent diabetic is to take a blood sugar reading before highway driving. Based on the blood sugar log she provided to the specialist after the crash, McNair did not take a blood sugar reading on August 14, 2002, though she drove 90 miles on the highway, nor did she take a blood sugar reading on August 15, 2002, before she drove on the highway and caused the fatal crash. The day of the crash, McNair's blood sugar, when it was measured nearly two hours after the crash, was 255, more than 2.5 times normal. Four days after McNair caused Cady's death, her husband, Roland McNair, allegedly blamed the crash on his wife's "diabetic reaction." Finally, in her January 10, 2008, Montana district brief, McNair admitted that she indeed had a "diabetic reaction" at the time of the fatal crash. (Tucker 12/16/07 district court brief, McNair 1/10/08 district court brief)

McNair's Driving Behaviors

In spite of her medical condition, McNair drove on a dangerous stretch of a winding, two-lane mountain road north of Seeley Lake, Montana, in Missoula County. Eye witness to the crash, Joel Contreras, a local teenager, was driving ahead of McNair the day of the crash. He admitted to normally exceeding the 70-mph highway speed limit on the few straight stretches of the highway but said he slows "for the corners." In a taped interview on September 8, 2005, Contreras told the MHP that six miles before the crash, McNair passed him "going really fast" when he was already going "[p]robably 80–85" and that McNair "never even hit her brakes when she was going around the corners." Because Contreras slowed for "the corners," he lost sight of her going around the curves and would catch up with her on the straight stretches. Another local driver, Donna Copenhaver, saw McNair going around the curves driving "erratic[ally] . . . like a drunk driver" veering over the center line on the curves by "a fourth car length . . . five to six times" within a 3- to 4-mile stretch ending approximately a mile before the crash site. Copenhaver thought about reporting McNair, but it was the end of the work day, she was "pooped," and had reported other drivers previously without result. Before the fatal blind curve posted with a 45-mph recommend speed limit, Contreras slowed but McNair did not. He saw her drift into the other lane and "it looked like she lost control going around it . . . until right at the end [near the opposite shoulder] and then she come back really sharp" into the oncoming lane and the car in which Cady was a

passenger. On impact, McNair was driving approximately 15 mph over the posted recommended 45-mph speed limit on the blind curve, according to the MHP. She told the MHP she was driving "the speed limit [of 70 mph] or less" at the moment of impact. With Contreras claiming she was going 80 to 85 before she started to drift into oncoming traffic, McNair may have slowed as she drifted. McNair took no evasive action based on the lack of skid marks. (Tucker 12/16/07 district court brief; MHP 9/8/05 taped Contreras interview; Montana Attorney General 6/7/07 taped Copenhaver interview, 6/7/05 Copenhaver statement, MHP 9/30/02 Crash Report) The MHP report showed that when she caused the three-car crash, McNair had committed prima facie violations:

- Was driving in direct violation of her driver's license restriction to drive only a car equipped with a steering knob, required because of the absence of her left forearm.
- Was at least 10 feet left of the center line at the moment of impact on the blind curve of a no passing zone.
- Committed careless driving.
- Committed inattentive driving.
- Was not wearing a seat belt. (MHP 9/3/02 Crash Report)

Force of the Impact

The vehicle in which Cady was riding was mangled steel, crumpled to the dashboard. The force was so violent that Cady was ejected out the window to waist level with her seat belt still buckled. Cady's forehead from above her right eye to her hairline had

a crow-bar width vertical indentation where her head struck the door pillar, her right eyebrow was scalped off her face; her eye glasses were shattered, her teeth and jaw were crushed so severely that a molar was hurtled to the back seat of the car in which she was riding, and Cady's wrist was snapped like a twig in her last physical act, a futile attempt to protect herself from the dashboard as it drove into her, freezing her palm in the upraised position, signaling observers such as a treating EMT of her awareness of her impending death. (Tucker 12/16/07 district court brief)

McNair also caused incapacitating injury to seven people, including two critically. (Tucker 12/16/07 district court brief)

Facts Relating to Lack of Prosecution of McNair

County Attorney Recusal

Missoula County Attorney Fred VanValkenburg recused himself from the case because of a friendship with the driver of the car in which Cady was a passenger, but he did not recuse his entire office in violation of American Bar Association (ABA) conflict of interest Rules of Professional Conduct adopted by the Montana Supreme Court.[2] The outcome was exactly what the rules were designed to prevent—the treatment of the case as a low priority. (Tucker 12/16/07 and 1/5/08 district court briefs)

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[2] ABA Rules 1. 10, "Imputation of Conflicts of Interest: General Rule," and 1.11. "Special Conflicts of Interest for Former and Current Government Officers and Employees."

One-Year Statute of Limitations Missed

The prosecution of McNair was handed to Chief Deputy Prosecutor Karen Townsend, who then missed the one-year misdemeanor statute of limitations[3] for prosecuting McNair for her misdemeanor prima facie violations. After making numerous unreturned phone calls to Missoula County, Tucker finally received a letter from Townsend dated October 8, 2003, nearly 14 months after the crash and nearly two months after the expiration of the misdemeanor statute of limitations. To Tucker's shock, Townsend informed Tucker that no charges would be filed against McNair:

> I am convinced after reviewing the evidence that could be presented at a trial that we would certainly be unable to meet our burden of proof beyond a reasonable doubt for a charge of Negligent Homicide[4]. .[sic] In fact, I do not believe that the evidence even amounts to a **"reasonable likelihood of conviction" which is the standard that I apply** when deciding whether or not to file charges. In order to meet the reasonable doubt standard, we would have to be able to show a jury the Ms [sic] McNair acted with the criminal intent of Negligence as defined by Montana Code

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[3] **MCA § 45-1-205. General time limitations.** (2) (b) A prosecution for a misdemeanor must be commenced within 1 year after it is committed.

[4] **MCA § 45-5-104. Negligent homicide.** (1) A person commits the offense of negligent homicide if the person negligently causes the death of another human being.

> Annotated. **Having prosecuted a number of Negligent Homicide cases** over the years, I am convinced that **we could not establish this mental state** for Ms [sic] McNair. (emphasis added) (Townsend 10/8/03 letter)

Townsend's letter did not mention whether she considered filing misdemeanor charges against McNair, McNair's prima facie violations, and it certainly did not mention that the statute of limitations for a misdemeanor charge had lapsed two months previously. (Townsend 10/8/03 letter)

The standard for prosecution in Montana is "probable cause," as was affirmed in *State v. Elliot*, 308 Mont. 227, 43 P.3d 279 (2002) six months before Cady was killed. See *State v. Arrington*, 260 Mont. 1, 6, 858 P.2d 343 346, (1993), which states, "[A] mere probability that a defendant committed the offense [is] sufficient" for probable cause; proof of the cases is not necessary.

County States Willingness to Reconsider Charging McNair

Tucker met with VanValkenburg and Townsend on October 13, 2005, to discuss their willingness to prosecute McNair for negligent homicide. The county attorneys tearfully apologized to Tucker and her family for missing the statute of limitations for a misdemeanor charge and agreed to reconsider charging McNair with negligent homicide. VanValkenburg acknowledged that a judge probably would not dismiss a charge of negligent homicide because the cause could be made for probable cause, but warned Tucker that there would be "an

extremely heavy burden" against prosecuting after so much time had lapsed since the fatal crash. (Tucker 12/16/07 district court brief)

VanValkenburg acknowledged that McNair's lack of a mandated steering knob was a "slam dunk" offense that easily could have been prosecuted. He wrongly "corrected" Tucker that negligent homicide carries a statute of limitations of five years when Tucker stated correctly that negligent homicide in Montana has no statute of limitations.[5]

At a subsequent May 11, 2007, meeting, Townsend stated that the statute of limitations ended on August 14, 2007. (Tucker 12/16/07 district court brief)

Conditional Prosecution Recommended

In a May 31, 2007, memorandum, responding to a request by County Attorney VanValkenburg, by-then retired Deputy Prosecutor Townsend recommended that Missoula County prosecute McNair conditional upon whether erratic driving could be substantiated—despite dismissals of negligent homicide charges against two non-drunk drivers in Yellowstone County, Montana (*State of Montana v. Kautz,* DC 03-999 (2004) and *State of Montana v. Sievers* DC 06-740 (2006)):

> This case is somewhat different—to be sure we seem to have drowsy driving as that is the only logical explanation for her drifting across the centerline, but we have more than just that. We may have

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[5] **MCA § 45-1-205. General time limitations.** (1) (a) A prosecution for deliberate, mitigated, or negligent homicide may be commenced at any time.

> evidence of erratic driving as described by [Donna] Copenhaver plus the deliberate refusal to use a steering knob on the car, and a consistent pattern of failure to control adequately for her diabetes. (Tucker 12/16/07 district court brief)

Attorney General Review

To Tucker's dismay, instead of proceeding with prosecution, VanValkenburg referred the case to his former law partner John Connor, then chief criminal counsel for the Montana Attorney General's Office. A Montana attorney general investigator obtained confirmation of McNair's erratic driving from witness Copenhaver in a June 7, 2007, taped interview. Yet in a July 16, 2007, letter, Connor recommended to VanValkenburg "that there is not enough evidence to charge [McNair with] a criminal offense." Connor's letter was so riddled with errors and misrepresentation of the material evidence that Tucker became convinced he was looking for reasons not to prosecute McNair to help his former law partner VanValkenburg avoid the embarrassment of having to admit to missing the misdemeanor statute of limitations. The errors in the letter included:

- Connor claimed that McNair had no driver's license steering knob restriction was "noted" on her driver's license. Fortunately for Tucker, the Attorney General's own Chief of the Records and Control Bureau confirmed for Tucker what he surely would have confirmed for Connor, that McNair's steering knob restriction had been in place for years before, at the time of, and after the crash.

- Connor claimed that no "nexus" was presented between the crash and the steering knob or lack thereof and that steering knobs are "no longer encouraged." Tucker was again forced to defend the state's evidence against misrepresentations by the Attorney General's Office. Such restrictions are imposed only after they have been found unable to drive safely such as by failing a driver examination.
- McNair's diabetes was not mentioned.
- That Copenhaver substantiated McNair's erratic driving was not mentioned.
- Perhaps most shocking of all, Connor committed the legal foul of blaming Bob Cushman, the driver of the car in which Cady was a passenger, for failing to dodge McNair. Connor speculated that the outcome of the crash "would have turned out differently" if Cushman had turned right toward the shoulder; though Connor admitted that Cushman "had virtually no time to react." (Tucker 12/16/07 district court brief)

On August 3, 2007, Tucker faxed a request to Montana's Attorney General Mike McGrath to facilitate prosecution of McNair to "stop the gross miscarriage of justice." Tucker stated, "The statute of limitations for a charge of negligent homicide against the driver [McNair] ends August 14, 2007." The Montana attorney general did not correct the misinformation about the negligent homicide statute of limitations as VanValkenburg had stated them.

Tucker Files for Judicial Remedy for Alleged Gross Misconduct

Hitting a brick wall with Montana prosecutors, on August 13 and 14, 2007, Tucker filed a pro se complaint and supporting brief against Montana Attorney General Mike McGrath and McNair in Montana's First Judicial District Court to request judicial remedy for Montana's failure to prosecute McNair. Tucker did so because the negative prosecution of McNair for the brutal death of Cady, a child, utterly disregarded for the rights of Cady and her family, to equal protection of the law and due process under the 14th Amendment of the U.S. Constitution and Cady's right to human dignity under any legal principles and specifically her "inviolable right to human dignity" under Article 2, Section 4, of the Montana Constitution. Tucker's case was dismissed by the district court on February 12, 2008. Tucker filed a timely appeal to the Montana Supreme Court. On December 30, 2008, the Montana Supreme Court affirmed the dismissal by the lower court (*Tucker v. State*, 2008 Mont 454N, 2008 WL 5413147 (2008). The Montana Supreme Court opinion affirming the lower court is provided in Appendix A, while the lower court order is provided n Appendix B. A photograph of the vehicle in which Cady was killed is provided in Appendix C.

Tucker asserts gross official misconduct by Montana prosecutors based on the following:

- Montana refused to prosecute McNair for killing Cady to avoid embarrassment to Missoula County for missing the statute of

limitations for McNair's prima facie misdemeanor violations and concealing that error for three years. Tucker alleged in her briefs to the Montana district court and to the Montana Supreme Court that once the statute of limitations was missed, the entire prosecutorial process was tainted as predicted by *Wong Sun et al. v. United States*, 371 U.S. 471; 83 S. Ct. 407 (1963).[6]

- VanValkenburg, an elected public official whose duty is to "seek justice" (see *State of Montana ex rel. Fletcher v. Dist. Court*, 859 P.2d 992, 993-995 (Mont. 1993) misled Tucker that the statute of limitations for negligent homicide was "five years," which harmed Tucker, who went to great expense to force Montana to file charges against McNair within five years and filed a complaint in Montana district court all based on believing VanValkenburg, Townsend, Connor, and Montana Attorney General McGrath who repeatedly implied the statute of limitations for negligent homicide was five years. ONLY in the Attorney General's motion to dismiss Tucker's complaint was the correct information provided by Assistant Attorney General Jennifer Anders to Tucker that a charge of negligent homicide "may be commenced at any time" under MCA § 45-1-205.

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[6] McGrath is no longer Montana attorney general. He was elected chief justice to the Montana Supreme Court on November 4, 2008.

- VanValkenburg's admission that a charge of negligent homicide against McNair would likely be sustained by a judge but his refusal to press charges despite the preponderance of evidence to show probable cause.
- VanValkenburg's turning over the case to his former law partner Connor in the Attorney General's office just when Townsend recommended conditional prosecution and despite the certain appearance and probable fact of a conflict of interest.
- The Attorney General's Office egregious misstatements in the July 16, 2007, Connor letter.
- The virtual "Keystone Cops" runaround that Connor and VanValkenburg maintained: For example, at a July 27, 2007, meeting Connor advised Tucker to request that VanValkenburg appoint a special prosecutor to investigate prosecution of McNair for negligent homicide and stated that VanValkenburg was in charge. Yet in an email just two weeks later on August 10, 2007, VanValkenburg renewed his claims of recusal and said Tucker should be talking instead with the Attorney General's Office. In a July 30, 2007, letter, the Attorney General's Office acknowledged that VanValkenburg had the "power" to appoint a special prosecutor for Tucker, but could not "encourage prosecutor shopping." (Tucker 12/16/07 district court brief, B. Harris 7/30/07 letter)
- Missoula County Attorney VanValkenburg refused to file a charge of negligent homicide

although he stated that such a charge would likely be affirmed by the trial judge, and Chief Deputy Prosecutor Townsend wrote that there was more probable cause against McNair than against the malfeasors in the two Yellowstone County drowsy driver cases where charges were filed.

- VanValkenburg's recusal from prosecution of McNair without recusing his entire office in violation of rules of professional conduct, which deprioritized prosecution of McNair, and initiated the miscarriage of justice and constitutional violations that continue to torment Tucker.
- Montana's refusal to prosecute McNair, though McNair's behaviors and choices were virtually indistinguishable from those of a drunk driver. (Tucker's 12/16/07 and 1/5/08 district court briefs)

Tucker appeals to this Court for the following remedies:

- Remanding this case to the Montana Supreme Court to appoint a special prosecutor to determine whether McNair should be prosecuted in light of the urgent need for national scrutiny of the prejudicial, grossly unequal treatment of the victims of non-drunk drivers relative to the victims of drunk drivers and the compelling state interest in deterring further highway killing of innocent people.
- Consideration of the novel extension of the private attorney general doctrine to compel criminal prosecution in this exceptional case

involving negative prosecution of negligent homicide with undisputed probable cause.

REASONS FOR GRANTING THE PETITION

I. Failing to prosecute negligent homicides in cases of those impaired by conditions other than alcohol or drugs violates the equal protection of laws under the 14th Amendment.

As a result of her uncontrolled diabetes, McNair drove 10 feet left of the center line in a no-passing zone at as fast as 70 mph by her own admission on a blind "S" curve posted with a recommended speed of 45 mph. Although her Montana driver's license required her to have a steering knob to drive legally, she drove without one, caused a head-on collision and killed Cady Tucker, Petitioner's 11-year-old highly intelligent and talented daughter. In this case, the defendant was not charged or prosecuted despite a strong case for negligent homicide.

Part of the reason for failure to prosecute was that McNair was "drunk" from lack of control of her diabetes while those prosecuted are drunk on the now-politically-correct-for-prosecution alcohol or drugs (and as noted above, Missoula County's missing the misdemeanor statute of limitations). This lack of prosecution when McNair committed numerous egregious law violations compared to those under the influence of alcohol or drugs fundamentally violates the equal protection and due process of law guaranteed under the 14th Amendment, Section 1, which states:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Going to the heart of the matter in the instant case, Tucker not only did not receive equal protection of the law, but no protection of law, as McNair was not charged, not prosecuted, and shockingly no mention whatsoever exists on her driving record that she caused a collision, let alone killed Cady. Tragically, this is typical in Montana highway fatalities not involving alcohol or drugs.

That it is unacceptable in a democratic society to allow killing Cady without any judicial response whatsoever is unequivocal. Because McNair was drunk on high or low blood sugar instead of alcohol when she killed Cady, her killing acts were not prosecuted as a crime merely because society has awakened to the opprobrium of drunken driving, while driving and killing under the influence of a known and obscenely out of control medical condition or other impairment is still allowed.

The question is just how many egregious violations are necessary for a charge to be made against a non-drunk driver in Montana. As noted by the cases enumerated, in jurisdictions in which non-drunk drivers are prosecuted, Cady's killer without doubt would have been prosecuted elsewhere, but the inconsistent laws and enforcement demand clarification because this lack

of prosecution violates Cady and her family's right to due process and equal protection under the 14th Amendment and must be remedied.

It is ironic that very strong language protects the "inviolable" right to human dignity in Article 2, Section 4, of the constitution of the state of Montana, where Cady's physical and legal personhood were obliterated:

> Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

The current state of the law in prosecuting non-drunk drivers causing fatalities is akin to the discrimination that blacks faced before the changes occurring in the 1960s. In the landmark case of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), this Court correctly overturned earlier rulings going back to *Plessy v. Ferguson*, 163 U.S. 537, (1896) in 1896, by holding that state laws that established separate public schools for black and white students denied black children equal educational opportunities and was an outrage. However, in the case of highway homicides committed by non-drunks, the unequal application of law results in the criminal justice system saying that these homicides are not worthy of prosecution and are just unfortunate "accidents." (See

Tom Vanderbilt, *Traffic at* p. 65, noting that the *British Medical Journal* quit using the term "accident" in 2001 because of "accidents" being miscontrued to be unpredictable and unpreventable when virtually every crash and vehicular fatality is preventable.)

Blacks and women have sought intervention for employment discrimination or unequal pay. See *Steele v. Louisville & Nashville Railroad Co. et al.*, 323 U.S. 192, 208, 65 S. Ct. 226, 234-35 (1944) and *Ledbetter v. Goodyear Tire & Rubber Co.*, Inc., 550 U.S. 618 (2007). This Court in *Steele* called for "constitutional condemnation" of the "utter disregard for the dignity" of blacks imposed by segregation. Cady and other victims of highway slaughter have paid with their physical lives and have only their legal lives left. When their legal lives also are robbed from them because of the prejudicial view by prosecutors that their deaths do not matter as much as those more politically correct deaths caused by drunk drivers, they are robbed of their last remaining sacred posthumous right to dignity to have those who killed them prosecuted.

Using typical equal protection analysis, the Court's opinions typically require erroneously that discrimination must be based on race or gender before the need for strict scrutiny is required. The class of victims killed in highway homicide include every race, gender, and economic strata. But rather than being "discriminated" against, by something that "down the road," so to speak, can be judicially corrected, highway homicide victims have had their lives robbed with no possibility of judicial review. The victims are relegated to a subclass unworthy of

having those who kill them prosecuted, and often jurisdictions do not take these deaths seriously enough to complete thorough investigations. The families of victims of non-drunk drivers commonly spend portions of the victims' estates to conduct the more thorough types of crash investigations themselves that are performed routinely by the state when drunk drivers cause deaths.

Today, the problem of highway homicide is just being "discovered" although it has been a long standing outrage just as racial discrimination has been. The U.S. Supreme Court, the Court of last resort to rectify this wrong, can and should intervene to end this discrimination against victims killed by those not under the influence of alcohol or drugs.

More than 40,000 people are killed on the roads of the United States each year," making highway safety of compelling state interest, writes noted traffic safety expert, Leonard Evans in his seminal treatise, *Traffic Safety*. "In a typical month more Americans die in traffic [crashes] than were killed by the 11 September 2001 terrorist attacks on New York and Washington." (Evans at p. 1).

The compelling public interest in highway safety demands that Cady Tucker, and the class of 26,000 others like her, be given the same protection, due process, and dignity of the pursuit of justice, as those killed by alcohol receive. It is fundamentally unfair for the deaths of these victims of non-drunk drivers to have no legal meaning. By granting this writ of certiorari, this Court will provide direction that equal protection of the law and due process

must be pursued vigorously for these victims and their families, and that failure to provide posthumous rights to equal protection and due process utterly disregards their profound right of human dignity. (Evans at p. 251)

Typically, only when a driver who caused a death was under the influence of alcohol is a crime considered to have been committed and does prosecution result. However, drivers not drinking alcohol cause 66% of the deaths annually. Their egregious acts are virtually indistinguishable, involve similar forethought, and show similar disregard for the safety of others. As Evans notes, "fatal crashes involve more egregious law violations than typical crashes." (Evans, at pp. 241, 345)

Currently, drunk drivers under the influence of alcohol or drugs are prosecuted and receive society's opprobrium. However, drivers who kill whether under the influence of alcohol, drugs, or "technically" sober, commit "more egregious law violations than typical crashes." *Id.* Such unequal prosecution violates the equal protection and due process guarantees under the 14th Amendment.

II. Prosecution of highway killers saves lives.

Prosecution of highway killers saves lives, as documented by the reduction in drunk-driving fatalities by 35% from 1987 to 2000 while the fatalities non-drunk drivers caused during this period escalated by 53% for the same period in part because of lack of adequate prosecution. (http://www-nrd.nhtsa.dot.gov/Pubs/TSF2005.PDF) This disparity in treatment has sent the message that highway killing committed while not under the

influence of alcohol is "okay." The Court's intervention is of the utmost, urgent, and compelling need to stop the loss of the lives of many of the best and brightest youth in our country through deterrence of such fatalities. (http://www-nrd.nhtsa.dot.gov/Pubs/TSF2005.PDF)

Noting the unparalled importance of crash prevention that comes as a result of prosecution of traffic crimes, Evans writes:

> Preventing 10% of crashes provides more benefit than crashworthiness measures that reduces fatality risk by 10%. This is because crashworthiness typically converts fatalities prevented into serious injuries, whereas when the crash is prevented, all harm from it is prevented. (Evans at p. 17)

A firmly entrenched economic principle is "that as the cost of an activity increases, less of it occurs, while as the reward for an activity increases, more of it occurs." (Evans at p. 33) This economic principle is echoed in Skinnerian psychology—that negative reinforcement or punishment reduces a behavior while positive reinforcement or a reward increases a behavior. The same may be said for highway safety.

Evans states that for some drivers merely having "a law on the books" changes their behavior, because they believe "that obeying the law is a canon of good citizenship." (Evans at p. 346) "Other drivers change their behavior to avoid the penalties specified in the law." *Id.* Compliance with traffic laws greatly depends on "how well the law is

enforced" depending on whether drivers discover "by personal observation, or reports from acquaintances, that detection is unlikely." *Id.* Moreover, "[t]he data suggest that about one death was prevented for every 80,000 tickets issued." *Id.* What kind of message can it send to society when a driver committing numerous egregious law violations resulting in a fatality is not even prosecuted and does not even receive a ticket when another driver receives a greater punishment of a $10 fine for not wearing a seat belt? Equal protection, due process, and dignity demand far better treatment of these victims robbed of their lives.

III. Montana's prosecutions are directed at those under the influence of alcohol or drugs.

Montana has the highest per capita highway fatality rate in the nation (http://www-fars.nhtsa.dot.gov/States/StatesFatalitiesFatalityRates.aspx). But Montana has only been willing to prosecute those under the influence. (See *State v. Larson*, 324 Mont. 310, 103 P.3d 524 (2004) (The defendant was convicted of negligent homicide for causing the death of his passenger while speeding and losing control of his vehicle while under the influence when his blood alcohol measured at 0.12%, or just barely over the legal limit of 0.10%.) (See also *State v. Nelson*, 283 Mont. 231, 941 P.2d 441 (1997) (Montana was willing to prosecute a defendant who was under the influence although he was involved in a single-car crash and injured only himself.)

Obviously, both of these cases strike at the fundamental core of fairness and 14th Amendment guarantees to equal protection and due process when

Nelson injured only himself while under the influence while McNair KILLED Petitioner's daughter while under the influence of her out of control diabetes.

Townsend acknowledged that Cady's case was stronger than the two Montana fatality cases of *Sievers* and *Kautz*. Both defendants were at least charged with negligent homicide although charges were ultimately dismissed while Cady's killer was not even charged. (See *State of Montana v. Sievers* [DC 03-999]) (The defendant caused a head-on collision and killed the driver of an oncoming vehicle. He admitted driving 400 miles per day, working 15 hours a day, and being "fatigued and groggy prior to the crash.") (See also *State of Montana v. Kautz* [DC 06-740]) (The defendant rear-ended the Hulls' stopped car, although he admitted seeing the Hulls' illuminated brake lights, killing 2-year-old Anna and seriously and permanently injuring Lindsay Hull.)

William Andrew Johnson, a diabetic, killed an infant and two young adults in one crash. (*State of Montana v. Johnson*, Cause No. DC-00-439) Multiple deaths apparently are required before Montana holds a non-drunk driver accountable even though the effects of uncontrolled diabetes can be worse than being under the influence of alcohol or drugs as evidenced by diabetics passing out at the wheel.

Another rare exception to the "prosecution of drunk drivers only" rule, Michelle Herd, a driver found to be influenced by lack of sleep rather than

alcohol, was convicted of negligent homicide. Herd killed five members of the Kerry Good family in a fiery blaze by driving on the wrong side of Highway 200 in Missoula County. (See *State v. Herd*, 320 Mont. 490, 87 P.3d (2004)) In Yellowstone County, one kill by *Sievers* and *Kautz* was not enough to prevent a judge's dismissal of charges of negligent homicide. In Missoula County, killing 11-year-old Cady Tucker was not enough to warrant an attempt at filing a single charge against McNair, disregarding Cady's dignity.

In Montana, the following prosecuted cases involved alcohol, crossing the center line, and causing a fatality, which are facts similar to Cady's case, or near fatalities. In *State v. Milligan*, 346 Mont. 491, 197 P.Ed 956 (Mt 2008), no one was killed—yet the defendant was still prosecuted illustrating the grossly prejudicial and unequal prosecution of the alcohol cases versus Cady's case in which she was killed. The last case, *Lambert*, is provided to show how historically Montana has lagged other states not only in the prosecution of highway homicides but even drunk drivers.

- ***State v. Milligan***, 346 Mont. 491, 197 P.3d 956 (Mt 2008) A head-on collision involved crossing the center line, speeding, and alcohol use. No one was killed, but the defendant was convicted of negligent vehicular assault for causing injuries to others. Milligan served 215 days in jail, although he killed no one.
- ***State v. Leverett***, 245 Mont. 124, ___, 799 P.2d 119, 126 (Mt 1990) The drunk driver who killed a pedestrian at an "unsafe rate of speed" with a blood alcohol exceeding 0.10 was

charged and found guilty of negligent homicide. His case was reversed and remanded.

- ***State v. Rumley***, 194 Mont. 506, 634 P.2d 446 (Mt 1981) The drunk driver found guilty of negligent homicide for speeding and driving recklessly prior to the crash was sentenced to a five-year suspended sentence in the state prison if he served 60 days in the county jail and performed public service.
- ***State v. Strobel***, 130 Mont. 442, 304 P.2d 606 (1956) The driver alleged to be drinking crossed the center line and caused a head-on collision and the oncoming truck driver's death. Her case was reversed and remanded for a new trial. Montana specifically rejected Idaho law that when one commits an act expressly prohibited by law that results in the death of a human being, the perpetrator is guilty of manslaughter, and in such a case an instruction on criminal negligence is neither necessary nor proper.
- ***State v. Ingraham***, 290 Mont. 18, 966 P.2d 103 (1998) The drunk driver, a lawyer, crossed the center line and killed driver of oncoming vehicle in a head-on collision. He was drinking but also had prescription drugs in his vehicle, which was introduced at trial. His blood tested positive for alcohol and drugs. He left the scene of the crash failing to render aid to the victim. Instead, broke into a house to call his father, also a lawyer, to attempt to build an alibi. His case was reversed and remanded.

- ***State v. Lambert***, 280 Mont. 231, 248-55, 929 P.2d 846, 856-57 (1996), illustrates Montana's nonplussing laissez-faire prosecution of drunks. Lambert caused a non-fatal head-on collision by turning the wrong way onto a highway. His "eye popp[ing]" driving record included nine driving-under-the influence convictions, 16 license suspensions or revocations; driving 20 times with a suspended or revoked license; sent to jail 11 times; fined between $30 and $1,000 for driving offenses; and while released on bail after causing the head-on, was again arrested for DUI and eluding a police officer. Yet, the Montana Supreme Court engaged in a "legal arabesque, pirouette, and struggle" to reverse and remand his conviction for criminal endangerment! While this Court certainly recognizes that states may be "laboratories of justice," certainly the U.S Constitution must define the boundaries of their experiments when they trample the constitutional rights, dignity, and *lives* of others.

In contrast to Montana, the following states have case law favoring prosecuting sober drivers who kill on the highways:

1. **South Dakota** (See *State v. Larson*, 582 N.W.2d 15, 19 (SD SCt 1998) A sober defendant was convicted of second-degree manslaughter and sentenced to two consecutive 10-year terms for killing two construction workers. The defendant crossed the center line by two feet and was traveling 62 to 68 mph in a zone with a recommended

speed of 55 mph, and was exceeding the speed limit from by 7 to 13 mph.) (See also *State v. Janklow*, 2005 SD 25 (2005) Janklow, a sitting U.S. congressman and former governor, was prosecuted and convicted for negligent homicide for speeding, running a stop sign, and killing an oncoming motorcycle driver while sober.

2. **Utah** (Compare *State v. Boss*, 205 UT App 520, ___, 540 Utah Adv. Rep. 15, ____, 127 P.3d 1236, 1237, 1239–40 (2005) The sober defendant was convicted of misdemeanor negligent homicide for killing a 4-year-old child. Each of Boss's actions—"speeding (five mph over the speed limit), passing a line of vehicles in the face of oncoming traffic, and making a sharp, overcorrecting lane transition—[were] seen as repeated deviations from the appropriate standard of care, each of which . . . result[ed] in a substantial and unjustifiable chance of death under the circumstances."

3. **Washington** (See *State of Washington v. Foos*, Court of Appeals Div. III, Docket No. 2567-5-III) A diabetic driver, who suffered severe vision problems related to diabetic retinopathy, was told not to drive, drove anyway, and killed a girl on a bicycle. His medical records documented his ineligibility to drive, and he was tried and convicted of negligent homicide.

4. **Colorado** (See *People of the State of Colorado v. Balkey*, 53 P.3d 788 (Col. 2002) A sober defendant, who passed cars in a no-passing

zone shortly before he crossed the center line and caused the death of the oncoming driver, was tried and convicted of negligent homicide.

5. **California** Although this California case is still pending, it involves a charged diabetic driver, John Mayfield, with two counts of misdemeanor vehicular manslaughter after he gave himself too much insulin, failed to check his blood sugar, put himself in a hypoglycemic stupor, crashed into and killed two young people. Mayfield was initially charged with felony negligent homicide but after dismissal of those charges, he was charged with misdemeanor vehicular manslaughter.)

The facts related to Cady's case were certainly as egregious as those in which the drunk and other non-drunk drivers were prosecuted. The only difference was that McNair was drunk on high or low blood sugar instead of the politically correct intoxicant—alcohol.

IV. The private attorney general doctrine allows for the novel appointment of a special prosecutor to prosecute McNair in light of the compelling public interest of deterring highway fatalities.

The foundation of Tucker's argument for remedy by this Court is the private attorney general doctrine, which has a lauded history in effecting social change. The doctrine dates back to *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943), culminated in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), and furthered

subsequent human, environmental, consumer, and civil rights.

The goal of the doctrine, according to Stephen Yeazell in "*Brown*, the Civil Rights Movement, and the Silent Litigation Revolution," 57 *Vand. L. Rev.* (2004), is allowing the weak and invisible to hold the powerful accountable—"a theme as ancient as the Psalms of the Old Testament." In this type of case, a private attorney general action allows "the vindication of rights," typically of the downtrodden, and encourages sending a message to public officials who can correct injustices. (Stephen Yeazell, *57 Vand. L. Rev.* (2004) at p. 2000)

This act was borne during the Watergate era to allow the appointment of an independent counsel, acting as an alternate attorney general, more politically removed and without conflicts of interest, to investigate the criminal misconduct of the president. (See, for example, *United States v. Nixon,* 418 U.S. 683 (1974))

In the instant case, as with important civil rights cases, the Petitioner knows a sharp anguish of important public interest, and seeks to express the need for an urgent remedy. Tucker suffers the senseless, sudden, and violent death of her only child because of the high crime of an alleged homicide, but with absolutely no prosecution of perpetrator or even a citation being issued when she caused the death of Tucker's daughter.

The application of the private attorney general doctrine grants an opportunity to expose negative prosecutions resulting from prosecutorial abuse, and when the lack of prosecution directly contradicts the compelling public interest in highway safety, could

provide the cornerstone to elevated citizen involvement in public policy, afforded through judicial review. Negative prosecutions in cases of alleged homicides with no opportunity for judicial redress present an unbearable burden for victims' family members, such as Tucker, at the expense of their constitutional rights. Declarations of unconstitutional practices were first recognized in *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803).

In 1970, this Court extended the application of the private attorney general document in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) by ruling that "any person aggrieved" can seek judicial review as a "private attorney general" on behalf of public interest under the Administrative Procedures Act. Totally on point to Tucker's case, in 1978, Congress authorized courts to appoint private attorneys as special prosecutors to investigate wrongdoings by executive branch officials (see 28 U.S.C. § 49 [1994] [Ethics in Government Act]) (See *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 673 P.2d 660; 197 Cal. Rptr. 783 (1983) (The private attorney general doctrine was used to attempt to minimize advertising of sugary cereals to children.) (See also *Stop Youth Addiction v. Lucky Stores*, 950 P.2d 1086 (Cal. 1998))(The private attorney general doctrine was used to prohibit the selling of cigarettes to minors). Tucker's issue is the profound injustice of her child being killed with impunity—despite a strong case for gross negligence.

V. The U.S. Supreme Court should prohibit Montana from using prosecutorial discretion to justify failing to prosecute McNair when Montana poisoned the case from the outset by missing and then concealing missing the misdemeanor statute of limitations.

Montana prosecutors missed the one-year statute of limitations for prosecuting McNair for numerous slam-dunk misdemeanor violations and then concealed their actions for three years. Their acts poisoned the case from the outset. The county should have appointed an independent prosecutor. Instead, the county concealed these facts and stated that McNair had not committed a crime when she killed Cady Tucker. They lacked objectivity and credibility under such a cloud of impropriety. Under such circumstances, this Court should check and balance Montana's acts and not allow prosecutors to hide behind claims of prosecutorial discretion to cover up misconduct.

While *Heckler v. Chaney*, 470 U.S. 821, 826 (1985) gave prosecutors the discretion to charge defendants, this Court articulated that the "breadth of a prosecuting attorney's discretion" can result in "both individual and institutional abuse" and stated that it "undoubtedly [has] constitutional limits upon its exercise,"

> Discretion may well be necessary to carry out a variety of important administrative functions, but discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives, and for that

> reason "the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion."
> *Id.* at 848, quoting L. Jaffe, "Judicial Control of Administrative Discretion: The Next Stage," *92 Yale L. J.* 1487, N. 11 (1983)

Judicial intervention is the appropriate check and balance on government misconduct. Unreviewability of misconduct and corruption would result in an abrogation of the doctrine of checks and balances and, if left unfettered, would ultimately result in a dictatorship. This very Court held in *United States v. Nixon,* 418 U.S. 683 (1974), that then-sitting President Nixon was accountable to the checks and balances of this Court when he had committed official misconduct.

Furthermore, this Court has made clear that "the case law since 1974 is strongly on the side of reviewability." Davis, K., Administrative Law 9:6 at p. 240 (1979), and that "there are undoubtedly constitutional limits upon [the] exercise" of prosecutorial discretion. *Id.* at 365. (See *Dixon v. District of Columbia,* 129 U.S. App. D.C. 341, 394 F.2d 966, 970 (1968), and *State of Montana ex rel. Fletcher v. Dist. Court,* 859 P.2d 992, 993-995 (Mont. 1993) (See also *Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General, et al.,* 341 U.S. 123, 71 S. Ct. 624, 95 L.Ed.817 (1951)) (Stating, that "an opportunity to be heard" and to have "a right to [a] day in court" are "basic to our system of jurisprudence.")

Missoula County poisoned this case from the outset by missing the misdemeanor statue of limitations and then intentionally concealing that fact for three years. (See *Wong Sun, et al. v. United States*, 371 U.S. 471; 83 S.Ct. 407 (1963) Thus, Missoula County's ability to prosecute this case fairly was obliterated. The only choice was the appointment of a special, independent prosecutor to go forward with the case. The U.S. Supreme Court, the Court of last resort, can rectify this wrong, and should intervene to reverse and remand this case to the Montana Supreme Court for the appointment of a special prosecutor to implement filing charges against McNair.

VI. Public interest requires equitable application of laws to correct that one class obtains prosecution while the other class has been marginalized to the point of being legally invisible.

The "invisibility" of highway killing is illustrated by the difference between American society's response to the shootings at Columbine High School versus the response to youths killed on the highways: "When 14 teenagers died in the 1999 Columbine High School shootings, much of the population of the US, led by President Clinton, grieved along with the bereaved families. Yet more teenagers are killed in a typical day in US traffic." (Evans at p. 1) According to 2005 statistics, 28,717 youths ages under age 35 were killed that year or 78 per day. Those youths killed in traffic deaths "barely touch the nation's consciousness." (Evans at p. 1) Yet, "[f]amilies bereaved by a traffic death are no

less devastated than the Columbine families." Id. As Evans notes, the "burden" for families in which the killing was on the highway "may be even more unbearable as they do not receive the support provided to the Columbine families." Petitioner's family and those in her class can attest that the burden when a family member is killed and law enforcement acts as if it were nothing and fails to prosecute, in part, because highway deaths are so commonplace and thus so "invisible," is unbearable.

According to the Fatality Analysis Reporting System (http://www-fars.nhtsa.dot.gov/States/StatesFatalitiesFatalityRates.aspx), the average number of fatalities per year from the past 12 years was 42,290 annually. Nonetheless, these deaths are practically invisible unless the crash involves a prominent person, such as Princess Diana, or some other person of fame or rank.

Highway killing is so acceptable that it is "The Tragedy of the Commonplace"—the roadways. The roadways are contemporary society's "commons" and require a social contract that to avoid a crash each driver must drive safely. The mass of society converges on the highways. Today, more people meet on highways than anywhere else in society. Garrett Hardin in "The Tragedy of the Commons" impliedly stated that one self-serving individual can destroy the roadway "commons." While his essay was applicable to the commons in an environmental sense, it is just as applicable to the roadways, the most important shared public space in society today.

As highway safety expert Evans noted, "We drive as we live." (Evans at p. 220) Evans pointed

out that an extremely small percentage of reckless, uncaring drivers, about 1%, engage in egregious law violations that cause the greatest number of fatalities and serious lifelong disabilities. Id. at 379 These violators of the social contract, or "golden rule of the roadway"—to drive unto others as you would have others drive unto you—is totally on point for the instant case and other fatal crashes. If society allows those who engage in egregious legal violations to the point of causing another driver or passenger's death and the criminal justice systems fails to act, the common roadways become more and more dangerous. If these violators are held accountable for their egregious acts, such acts will be deterred, as has happened in the area of drunk driving.

The deaths of persons in this marginalized subclass have been winked at with these highway killers getting off as if the lives they took were nothing more than an accepted risk of a mobile society. However, in 2000, the economic cost to society of all fatal crashes in this country was $231 billion, an amount greater than the gross domestic product of all but a few counties (Evans at p. 1). Two-thirds, or $152 billion, of this economic devastation resulted from fatalities that did not involve alcohol (Evans at p. 251). Evans correctly notes that:

> [E]conomic costs represent only one aspect of the consequences of motor vehicle crashes, and do not reflect the pain, loss of function, disfiguration, emotional stress, and other suffering to the victims and immediate families. The lifetime economic cost to society for

> each fatality is estimated at just under a million dollars, over 80 percent of which is attributable to lost workplace and household productivity. . . . The fact that most victims are young crucially affects the estimated cost of a fatality . . . . (Evans at p. 25)

The loss of one's child is the "worst of all losses," writes Psychotherapist Barbara D. Rosof in her book *The Worst Loss*:

> Losing a child is a different kind of loss. Its dimensions are more profound, and the swath it cuts across families' lives is much broader than that of any other loss. . . . The death of a child is a loss like no other. The *Diagnostic and Statistical Manual of Mental Disorders*, psychiatry's diagnostic bible, does not overstate the case when it calls the death of a child a "catastrophic stressor." It robs parents of what they love most. . . .
>
> When you lose someone you love, your world changes forever. When you lose a child, it falls to pieces. Nothing can ever be the same again. (Rosof at pp. vii, 3, 51)

Rosof notes that sudden, violent deaths such as those caused by car crashes compound the parental suffering:

> Suddenly, with no warning, their child is dead. They are left with the pain of misunderstandings undealt with, plans unfulfilled, the future abruptly broken off. For them there is no chance to prepare, no time to say good-bye. The overwhelming shock and utter helplessness felt after unexpected deaths add extra complexities to the difficult work of grieving.
>
> When the death has been violent, survivors suffer the additional horrors of imagining the child's experience, pain, and aloneness. (Rosof at p. 45)

The risk of being killed throughout one's lifetime is 1 in 84, according to the National Safety Council. (http://www.zerofatalities.com/, See also Tom Vanderbilt, *Traffic* at p. 249.)

Furthermore, if the destruction of what is most cherished in life, and death, the dignity of one's child—who is one's future, and the embodiment of one's hopes, one's dreams, and one's reason for being—as Cady's dignity is for Tucker—is irrelevant to the criminal justice system, which is certainly the message conveyed by failing to files charges when that most cherished life is stolen, the criminal justice system is irrelevant itself. This Court's intervention is required to reassert the age-old, most sacred tenet of our democracy, that each life counts, has meaning, demands equal protection of laws and due process, and is deserving of human dignity and justice. To determine otherwise, robs the relevancy of life itself.

CONCLUSION

Tucker appeals to this Court to grant this writ of certiorari to allow the following remedies: (1) end the unequal treatment of drunk versus non-drunk drivers and (2) remand the case to the Montana Supreme Court for the appointment of a special prosecutor.

For the foregoing reasons, this Petition for writ of certiorari should be granted.

Respectfully submitted.

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March 30, 2009

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF MONTANA DECIDED DECEMBER 30, 2008

No. DA 08-0167

IN THE SUPREME COURT OF THE STATE OF MONTANA

2008 MT 454N

PATSY A. TUCKER,

Plaintiff and Appellant,

v.

STATE OF MONTANA, ex rel., MIKE McGRATH, Attorney General, and JANIE McNAIR a/k/a CLYSTA JANIE McNAIR, resident of Libby, Montana,

Defendants and Appellees.

Submitted on Briefs: December 3, 2008

Decided: December 30, 2008

Justice Patricia O. Cotter delivered the Opinion of the Court.

Pursuant to Section 1, Paragraph 3(d)(v), Montana Supreme Court 1996 Internal Operating Rules, as amended in 2003, the following memorandum decision

shall not be cited as precedent. Its case title, Supreme Court cause number and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

On August 15, 2002, eleven-year-old Cathryn Tucker (Cady) was killed in an automobile accident when the car in which she was a passenger was struck by another car driven by Janie McNair. At the time of the accident, McNair, an insulin-dependent diabetic who is missing her left forearm, was not cited by the Montana Highway Patrol for any criminal violations. Missoula Deputy County Attorney Karen Townsend was assigned to handle the case. Townsend did not file misdemeanor traffic charges against McNair within the prescribed one-year statute of limitations. Section 45-1-205(2)(b), MCA.

In 2003, Cady's mother, Patsy Tucker (Tucker), requested that Townsend bring felony negligent homicide charges against McNair. Townsend declined at that time, explaining the State could not satisfy its burden of proof that McNair acted with the requisite criminal intent. However, in May 2007, the county attorney's office asked Montana Attorney General Mike McGrath to review the county's file on the matter and advise whether criminal charges were warranted. McGrath's office concluded that criminal charges were not warranted. Upon notification of McGrath's conclusion, Tucker sent him a letter asking him to order the Missoula County Attorney to bring such charges against McNair. McGrath refused.

Appendix A

Tucker filed her pro se civil complaint against McGrath, the state of Montana, and McNair in the First Judicial District Court on August 13, 2007. Tucker appears to be suing the State and McGrath for McGrath's failure to exercise supervisory authority over the Missoula County Attorney's Office by instructing that office to file criminal charges against McNair. The complaint fails to identify any particular claim against McNair. Tucker asked the court to preserve the statute of limitations for bringing felony criminal charges and to require the Montana Attorney General to bring such charges. Both McNair and McGrath filed timely motions to dismiss under M.R. Civ. P 12(b)(6), MCA.

In February 2008, the First Judicial District Court granted both the State's and McNair's motions. It concluded that the one-year statute of limitations for misdemeanor offenses had run, as had the five-year statute of limitations for most felony criminal offenses. It determined that it had no authority to either toll or extend these limitations' periods. The court acknowledged, however, that prosecution for negligent homicide has no statute of limitations, § 45-1-205(1)(a), MCA, and therefore could be commenced at any time. Consequently, the District Court turned to Tucker's second prayer for relief-a court order requiring the Attorney General to pursue such a prosecution for negligent homicide. The District Court concluded that a court, which is part of the judicial branch of government, does not have the authority to require the attorney general, an agent of the executive branch of government, to initiate a prosecution, and that to do so

would violate the principle of separation of powers. The court also recognized that both the Missoula County Attorney and the State Attorney General had carefully reviewed the case and concluded that criminal charges were not warranted. The court determined that their decisions not to prosecute were authorized under the concept of prosecutorial discretion.

Additionally, the District Court noted that, while it did not appear from the complaint that Tucker was seeking a civil remedy against McNair, the applicable civil statute of limitations had expired three years after the accident and therefore precluded such a claim by Tucker against McNair. The court further noted that it appeared from the record that Tucker had filed a civil action against McNair in 2003 and McNair had filed a Consent to Default Judgment.

Tucker appeals the District Court's dismissal of her complaint. The dispositive issue on appeal is whether the District Court erred in granting McNair's and McGrath's motions to dismiss.

We review de novo a district court's ruling on a motion to dismiss under M.R. Civ. P. 12(b)(6), MCA. We affirm a district court's decision granting a motion to dismiss "when we conclude that the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim." Whether a complaint states a claim for which relief can be granted is a question of law which we review for correctness. *Good Schools Missoula v. Pub. School Dist.*, 2008 MT

231, ¶ 15, 344 Mont. 374, ¶ 15, 188 P.3d 1013, ¶ 15 (internal citations omitted).

We sympathize with Tucker and understand her frustration. Nonetheless, we must follow the law. It is appropriate to decide this case pursuant to Section 1, Paragraph 3(d) of our 1996 Internal Operating Rules, as amended in 2003, which provides for memorandum opinions. The District Court correctly determined that the statutes of limitations for both the misdemeanor and civil claims had expired. The court also correctly concluded that while a prosecution for negligent homicide could be commenced at any time, it did not have the lawful authority to order the Attorney General to pursue such a prosecution. Based upon the court's appropriate legal analysis and conclusions, Tucker was not entitled to the relief she sought and the District Court correctly granted the motions to dismiss. We therefore affirm the judgment of the District Court.

/S/ PATRICIA COTTER

We concur:

/S/ JAMES C. NELSON
/S/ W. WILLIAM LEAPHART
/S/ JOHN WARNER
/S/ BRIAN MORRIS

APPENDIX B — MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS FILED FEBRUARY 12, 2008

MONTANA FIRST JUDICIAL DISTRICT COURT LEWIS & CLARK COUNTY

Cause No.: CDV-2007-589

PATSY A. TUCKER,

Plaintiff,

v.

STATE OF MONTANA *ex rel.* MIKE McGRATH, Attorney General, and JANIE McNAIR, a/k/a CLYSTA JANIE McNAIR, resident of Libby, Montana,

Defendants.

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Defendants State of Montana *ex rel.* Mike McGrath, Attorney General (State), and Janie McNair (McNair) have moved to dismiss the complaint filed by Patsy A. Tucker (Tucker). The motions have been submitted on the briefs. The Court concludes that the motions should be granted.

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BACKGROUND

Tucker is the mother of Cathryn Claire Rose Tucker (Cady), who was killed August 15, 2002, when the car in which she was a passenger was struck by a vehicle driven by McNair near Seeley Lake, Missoula County, Montana. At the time of the accident, McNair, an insulin-dependent diabetic, may have been suffering from some complications caused by her diabetes. McNair was not cited for any criminal violations by the Montana Highway Patrol.

Following the accident, Fred Van Valkenburg (Van Valkenburg), Missoula County Attorney, recused himself from handling the matter due to his friendship with Robert Cushman, the driver of the vehicle Cady was riding in as a passenger. Van Valkenburg assigned Karen Townsend (Townsend), Deputy County Attorney for Missoula County, to the case. Townsend, however, failed to file misdemeanor traffic charges against McNair within the prescribed one-year statute of limitation.

In a meeting with Townsend in 2003, Tucker requested Townsend to pursue a negligent homicide charge against McNair. After a review of the investigative documents, Townsend declined to file such a charge. In a letter to Tucker, Townsend opined that the State most likely could not meet its burden of proving beyond a reasonable doubt that McNair acted with the criminal intent of negligence.

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In August 2005, Tucker sent Townsend a letter requesting that she reconsider filing a negligent homicide charge against McNair. Later in 2005, Van Valkenburg and Townsend agreed to review the investigative file.

In late May 2007, with the five-year statute of limitation for a felony charge (excluding a negligent homicide charge) ending in August 2007, Townsend provided Van Valkenburg with a memo discussing whether a negligent homicide charge should be brought against McNair. Townsend was still pessimistic about whether a prosecution would be successful, but did opine that depending on information gathered from additional witness interviews and test results, a prosecution might be reasonable.

Thereafter, Van Valkenburg requested the Montana Attorney General's office to independently review the matter to determine whether criminal charges were warranted. Attorney General Mike McGrath (McGrath) assigned Chief Criminal Counsel John Connor (Connor) and Prosecution Services Bureau Chief Barbara Harris (Harris) to review the case.

After reviewing the investigative file submitted by Van Valkenburg, supplemental materials from Tucker, including expert witness opinions, and conducting their own investigation, Connor and Harris concluded that criminal charges against McNair were not warranted. Connor and Harris issued their findings in a letter to Van Valkenburg and Tucker.

Tucker then sent a letter directly to McGrath and requested that he order Van Valkenburg to prosecute McNair. McGrath denied Tucker's request, reiterating the conclusions drawn by the independent investigation conducted by Connor and Harris.

Tucker filed her complaint on August 16, 2007.

STANDARD OF REVIEW

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), M.R.Civ.P., the Court must consider the complaint in the light most favorable to the plaintiff and accept the allegations in the complaint as true. *Goodman Realty, Inc. v. Monson*, 267 Mont. 228, 231, 883 P.2d 121, 123 (1994). A complaint should not be dismissed under Rule 12(b)(6), M.R.Civ.P., unless it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Wheeler v. Moe*, 163 Mont. 154, 161, 515 P.2d 679, 683 (1973). "In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." *Id.*, at 161, 515 P.2d at 683. *See also Buttrell v. McBride Land & Livestock Co.*, 170 Mont. 296, 298, 553 P.2d 407, 408 (1976). For these reasons, a trial court rarely grants a motion to dismiss for failure to state a claim upon which relief can be granted.

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DISCUSSON

In her complaint, Tucker seeks to have the Court assume jurisdiction to: 1) preserve the applicable criminal statutes of limitation; and 2) order McGrath to file a negligent homicide charge against McNair.

A. Criminal Statutes of Limitation

The statute of limitation for a misdemeanor criminal offense is one year, and five years for a felony offense. Section 45-1-205(2)(a) and (b), MCA (2001 and 2007). The time begins to run on the day after the offense is committed. Section 45-1-205(7)(a), MCA (2001 and 2007).

Here, the accident in which Cady was killed occurred August 15, 2002. The statute of limitation for a misdemeanor charge lapsed on August 15, 2003, and August 15, 2007, for a felony charge. Consequently, no criminal charges can be brought against McNair for her actions on August 15, 2002, as the statutes of limitation have run. Additionally, the Court has no authority to either toll or extend the statute of limitation for either a misdemeanor or a felony criminal offense. However, Montana law does provide that a prosecution for negligent homicide may be commenced at anytime. Section 45-1-205(1)(a), MCA (2001 and 2007). Effectively, there is no statute of limitation for that offense.

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B. Civil Statute of Limitation

Because the accident occurred in August 2002, Section 27-2-204(2), MCA (2001), is the applicable statute of limitation. It provided: "The period prescribed for the commencement of an action to recover damages for the death of one caused by the wrongful act or neglect of another is within three years." Since Tucker did not file this action until August 13, 2007, any civil claim she had against McNair is barred by the statute. It does not appear from the complaint that Tucker is seeking a civil remedy against McNair. However, in Tucker's brief filed January 2, 2008, she has asked the Court for relief from the three-year statute of limitation to pursue civil sanctions against McNair based on the discovery doctrine. The discovery rule is set out in Section 27-2-102(3), MCA. It provides:

> The period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party if:
>
> (a) the facts constituting the claim are by their nature concealed or self-concealing; or
>
> (b) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.

Here, Tucker was aware in 2002 that McNair caused the accident which resulted in Cady's death.

Furthermore, it appears from documents Tucker has submitted to the Court that she filed a civil lawsuit against McNair in 2003. Attached to her brief filed January 9, 2008, is a copy of McNair's Consent to Default Judgment, filed September 30, 2003, Montana Fourth Judicial District Court, Missoula County, Cause No. DV-2003-248.

For these reasons, the Court concludes that Defendant's motions to dismiss Tucker's claim for preservation of the statutes of limitation should be granted.

C. The Filing of a Negligent Homicide Charge against Janie McNair

Tucker contends that under the private attorney general doctrine, the Court should order McGrath to commence a negligent homicide prosecution against McNair. She argues that because deterring roadway fatalities is an issue of compelling public interest, the private attorney general doctrine should be applied. Tucker further argues that the State's failure to prosecute McNair violates Cady's inviolable right to human dignity and equal protection, Article II, section 4, of the Montana Constitution, as well as Cady's rights to due process, Article II, section 17, and the right to administration of justice under Article II, section 16.

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The State and McNair argue that prosecutors are granted broad discretionary authority to decide whether to file criminal charges. Additionally, it would violate the principle of separation of powers for the Court, part of the judicial branch, to order the attorney general, part of the executive branch, to initiate a prosecution. The Court agrees with the State and McNair.

In Montana, a county attorney has broad discretion to determine when, or when not to prosecute a case. *State ex rel. Fletcher v. Dist. Ct.*, 260 Mont. 410, 414-15, 859 P.2d 992, __ (1993). At the same time, the attorney general has statutory authority to oversee and direct county attorneys. Section 2-15-501, MCA, provides in relevant part:

> It is the duty of the attorney general:
>
> . . .
>
> (5) to exercise supervisory powers over county attorneys in all matters pertaining to the duties of their offices and from time to time require of them reports as to the condition of public business entrusted to their charge. The supervisory powers granted to the attorney general by this subsection include the power to order and direct county attorneys in all matters pertaining to the duties of their office. *The county attorney shall, when ordered or directed by the attorney general, promptly*

> *institute and diligently prosecute in the proper court and in the name of the state of Montana any criminal or civil action or special proceeding.*

(Emphasis added.)

Here, both the Missoula County Attorney and the Attorney General have analyzed and investigated the August 15, 2002, accident in which Cady was killed. Separately, each has determined that a negligent homicide charge is not warranted against McNair. The decision not to prosecute the matter is authorized under the concept of prosecutorial discretion. Further, Tucker's argument that the private attorney general doctrine authorizes the Court to order a prosecution lacks merit.

Finally, if the Court were to order the attorney general's office to initiate a prosecution against McNair, it would violate Article III, section I, of the Montana Constitution. That provision provides:

> The power of the government of this state is divided into three distinct branches — legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

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In Montana, both the attorney general and county attorney are part of the executive branch of government, while the district court is part of the judiciary. *See generally* Title 2, Chapter 15, MCA, and Title 3, Chapter 5, MCA. Accordingly, under the doctrine of separation of powers, the Court has no power to order the attorney general to act in a specific way. Therefore, the Court concludes that it should grant Defendants' motions to dismiss Tucker's request that the Court order the attorney general to prosecute McNair for negligent homicide.

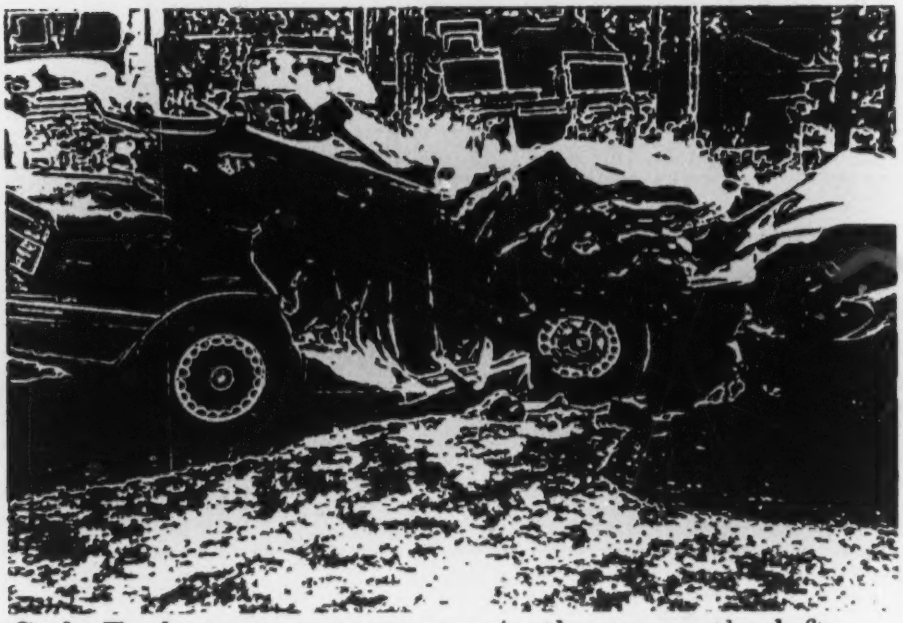
NOW, THEREFORE, IT IS ORDERED that the Defendants' motions to dismiss the complaint **ARE GRANTED.**

DATED this 12th day of February 2008.

s/ Thomas C. Honzel
THOMAS C. HONZEL
District Court Judge

pcs: Patsy Ann Tucker
Anne G. Biby
Mike McGrath/Jennifer Anders

Appendix C—Photographs and Drawing



Cady Tucker was a passenger in the car on the left when she was killed on August 15, 2002. The car on the right was driven by Janie McNair, who caused the collision.

Appendix C

Cady Tucker after winning two blue ribbons at her track meet on May 13, 2002.

Appendix C

Cady's drawing "Live in Wonder," June 2002.

PETITION FOR RE-HEARING

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(2)

Supreme Court, U.S.
FILED
JUN 12 2009
OFFICE OF THE CLERK

No. 08-1239

IN THE

SUPREME COURT OF THE UNITED STATES

PATSY A. TUCKER—*Petitioner*

VS.

STATE OF MONTANA EX REL,
STEVE BULLOCK, ATTORNEY GENERAL, AND
JANIE MCNAIR A/K/A CLYSTA JANIE MCNAIR,
RESIDENT OF LIBBY, MONTANA—*Respondents*

On A Writ Of Certiorari
To The Supreme Court
Of The State Of Montana

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to U.S. Supreme Court Rule 44.1, Petitioner Patsy A. Tucker respectfully submits this petition for rehearing.

I. INTERVENING CIRCUMSTANCES

The "**intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented**" under U.S. Supreme Court Rule 44.2 that require rehearing in Tucker's case is this Court's May 18, 2009, ruling in *Ashcroft v. Iqbal*, No. 07-1015, 556 U.S. ___ (2009) in which the Court extended its requirements introduced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) for a complaint to withstand a motion to dismiss when alleging discrimination and directing the lower court to consider allowing respondent Iqbal, a suspected terrorist, to amend his complaint to meet the *Twombly* "plausibility" standard.

Iqbal, a Pakistani Muslim, was detained and tortured in prison in the wake of the September 11, 2001, terrorist attacks. This Court stated that Iqbal's complaint must set forth facts "plausibly showing" that the petitioners purposefully found these detainees of "high interest because of their race, religion, or national origin."

Tucker respectfully requests the same right as a suspected terrorist to amend her complaint to prevent its dismissal. While Iqbal, a suspected terrorist, raised the current politically correct hot-button issue of torture, Tucker's case raises the more

important and irrevocable issue of death. Tucker's invidious claims of discrimination did more than cross "the line from conceivable to plausible"—they documented unequivocal discrimination existing between a drunk killing on the highway and a nondrunk killing on the highway. Tucker's claim of discrimination is not merely "plausible" but undeniable, and her case must be reheard.

The critically important factor for this Court to consider is that while *Iqbal* and *Twombly* wrongly raise the bar for plaintiffs' pleadings to withstand motions to dismiss, that notwithstanding, it is the standard now set forth by this Court, and Tucker meets this new *Iqbal* standard. Tucker exhaustively provided in her writ of certiorari to this Court and in her briefs to the lower courts in Montana factual data that McNair drove "like a drunk," acted like a drunk, and killed like a drunk, but not only was she not prosecuted like a drunk, she was not prosecuted at all, solely because she was under the influence of sugar—either too little or too much—instead of alcohol.

The equal protection and due process rights under the 14th Amendment of the United States Constitution and the inviolable right to human dignity under any system of justice of Tucker's young daughter, Cathryn Claire Rose Tucker, killed by a nondrunk driver indifferent to the safety of others, and the millions of other victims killed by unprosecuted nondrunk drivers, were dismissed and disregarded along with the dismissal and disregard of Tucker's pleading.

If this Court is to regard the rights, life, and dignity of native-born Cady Tucker in any way as much as suspected terrorist Iqbal, this Court must grant Tucker's petition for a rehearing and grant Tucker the same opportunity to be heard, or alternatively to amend her complaint, as it correctly allowed for Iqbal when Tucker's complaint involves death and virtually everyone traveling on highways, who benefit when the guilty are held accountable and future deaths are deterred. *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973)

II. ARGUMENT

Tucker is the mother of Cady Tucker, 11, whose brutal and ignored death on August 15, 2002, forced Tucker to beg this Court for a breath of justice in her writ of certiorari, as follows:

> This Court's intervention is required to reassert the age-old, most sacred tenet of our democracy, that each life counts, has meaning, demands equal protection of laws and due process, and is deserving of human dignity and justice. To determine otherwise, robs the relevancy of life itself (*Tucker v. State of Montana ex rel.*, No. 08-1239, Petition for Writ of Certiorari, March 30, 2009, p. 38)

As well documented in Tucker's writ and lower court briefs, Tucker has endured her daughter being violently killed in Missoula County, Montana, by Respondent McNair, a driver who was out of control

as much or more than a drunken killer because of her refusal to control her severe diabetes, who, though one-handed, **flouted her driver's license restriction** to drive only a vehicle with a steering knob **and the most important and basic rule of the road, driving on the right side of the highway**. McNair caused a head-on collision and massive three-car crash, almost killing two others including another child, Tucker's then 10-year-old nephew and seriously injuring five others. Two and one-half years earlier, McNair caused a two-car crash by blowing a stop sign at a major highway intersection, which likely led to the untimely death two and one-half months after that crash of an elderly driver of one of the cars struck while trying to evade McNair. McNair's blood sugar just days before the crash killing Cady was 600 mg/dL—**a near comatose level**. The standing orders of the ER physician she saw just shortly before the crash for uncontrolled blood sugar were **not to drive** or operate any heavy equipment. But McNair failed to even test her blood sugar the day before or the day of the crash—though she drove on the highway both days. According to McNair's own admission, she took over the wheel as few as 15 minutes before she caused the deadly crash and the death of Cady, an innocent passenger in a car on the right side of the road. McNair, totally in the wrong lane of traffic, was an undeniable threat to the safety of innocent people on the highway, and clearly equals or exceeds that of prosecuted drunk drivers.

Montana prosecutors knew of this history because the tortured mother unearthed it and

presented it to them. Missoula County prosecutors refused to prosecute because McNair was not drunk on alcohol. McNair's own lawyer finally in an after-the-fact volte face admission stated that McNair had a "diabetic reaction" when she killed Cady after years of McNair denying that she had lost consciousness. This admission meant that McNair, who caused the crash when she was 10 feet over the center line of a treacherous two-lane mountain road and directly facing oncoming traffic, was as unconscious as any drunk while driving. Because of McNair's obscenely uncontrolled diabetes while driving as opposed to uncontrolled drinking while driving, she killed Cady with absolute impunity—a shameful disregard of Cady's dignity that was in essence sanctioned by this Court when it denied Tucker's writ.

This difference is at the heart of Tucker's case and an absolute violation of her daughter's and her own right to equal protection under the law under the 14th Amendment to the U.S. Constitution and Cady's right to human dignity under **any** legal principles. If McNair had been oblivious to her surroundings while driving and found herself in the wrong lane of a two-lane highway and killed a child because of drunkenness, she without question would have been prosecuted for negligent homicide, reckless driving, or driving under the influence. Outrageously, she was **not prosecuted at all nor was she <u>even ticketed</u>**.

While alcoholism is often medically termed a "disease" or an "illness," it is routinely prosecuted in

Montana and other states when uncontrolled and causes a highway homicide. Yet, McNair's severely uncontrolled, deadly diabetes, thoroughly documented as having the capability to cause loss of consciousness, failed to provoke **any** meaningful reaction whatsoever by Missoula County and Montana. If Cady had been killed by a driver drunk on alcohol, her killer would have been prosecuted, acknowledging that a crime resulting in Cady's death was committed against the state and society as a whole. After all, virtually every person travels on highways. This commons area is where people meet—collide and are injured if not killed—with the greatest frequency.

Killing today by nondrunk drivers is treated very differently in different state jurisdictions and intervention by this Court is mandatory to put a stop to this lawless killing allowed in Montana relative to other states. Montana has the highest highway fatality rate in the nation. This Court should remand this case, and require the appointment of a special prosecutor to determine, finally and fairly, whether McNair should be prosecuted for killing Cady Tucker.

The hallowed Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) corrected its own previous unconscionable standard of "separate but equal" under *Plessy v. Ferguson*, 163 U.S. 537 (1896) because society could no longer tolerate the terrible wrong of segregation. The buried and forgotten victims of highway homicides, stripped of **all** their rights, **have no protection**

whatsoever, separate or unequal. They and their families are a marginalized subclass, with the victims' lives obliterated, and the families' lives torn apart forever after, have nonexistent protection under the law.

If equal or **any** protection under the law is to exist, this Court must acknowledge the grossly unequal treatment for Cady and other victims of nondrunk drivers who kill with impunity—though their violations are as egregious—relative to the victims of drunk drivers. The families of the victims of drunk drivers are allowed their day in court to face the perpetrator, and frequently receive an apology from the killer. The victims of nondrunk drivers are treated as a subhuman, discriminated class, getting nothing from society—not even acknowledgement that a wrong has been committed.

At issue is the squandering of lives and squandering the opportunity for deterrence by failing to prosecute for homicides. The victim loses her last gasp of dignity, the victim's family loses the opportunity to face the killer and receive the apology that charged killers are only too eager to make, the public loses the chance for deterrence and holding the guilty accountable, and criminal justice system and this Court loses credibility. If a child's killing, representative of many thousands of similar killings within a subjugated class each year, is ignored and condoned by this Court, the Court only endorses the shameful disregard for Cady, her family, and the countless other victims of reckless, murdering, but nondrunk drivers have endured.

On January 16, 2009, this Court granted the writ of certiorari in *Safford Unified School District v. Redding*, 08-479, although that case involved issues of far less gravity and importance than the instant case. The Court and the justice system in general seems to view legal issues from the vantage point of a very narrow constitutional prism that creates heinous judicial blinders that currently obliterate justice from visibility in the area of highway safety. Highway safety is an irrevocable issue of life and death whereas the strip-search issue is one of temporary humiliation. The respondents in *Redding* stated that being strip-searched "has profound, long-lasting consequences." (*Safford Unified School District v. Redding*, 08-479, Brief for Respondent, submitted March 25, 2009, p. 11) It was described as the "most humiliating experience" of the girl's life. *Id.* at p. 3. While the strip-search may have been humiliating and may even have "profound, long-lasting consequences," the experience does not compare with death. There is **no recovery** from death.

Furthermore, for anyone to allege that being strip-searched is a more violative act than being senselessly killed illustrates the current wrongheadedness of the law related to highway safety and why the Court should grant review of Tucker's case. By not granting review, the Court is giving tacit approval to the senseless killing of Cady Tucker and the millions like her who have been killed or injured by nondrunk drivers.

The Montana prosecutors in Cady Tucker's case chose, specifically, NOT to prosecute her killer because the killer was not drunk. Far from a strip search, Cady was **killed**, and the treatment by the judicial system stripped Cady of her membership of the class of humanity, and treated her highway death like road kill, and as of little consequence.

This Court squanders its own credibility to grant the writ of certiorari involving the strip search of a child but to deny the writ involving the brutal death of a child stripped of her life at the hands of an indifferent killer and her last opportunity for dignity and justice by indifferent prosecutors. An indifferent Court will send a message that reinforces prosecutorial and societal indifference.

The leading cause of death of all ages 2 to 33 is vehicular crashes (http://www-nrd.nhtsa.dot.gov/Pubs/809-661.PDF). Approximately, 43,000 are killed each year by crashes, and 69% of these are caused by nondrunk drivers (http://www.madd.org/About-Us/About-Us/Statistics.aspx). In some states, such as Utah and California, nondrunk drivers who kill are being prosecuted. In Montana, as shown in Tucker's writ, nondrunk drivers are typically prosecuted for negligent homicide **only** when they commit multiple kills—getting away with a free kill. This "free kill" constitutes highway lynching and is tantamount to the violence and deaths resulting from racial discrimination in the days when jurisdictions would wink if a black boy or girl were killed. It is also

historically identical to the days when society as a whole would wink when a drunk would kill.

As noted in Tucker's writ, the number of persons wrongly killed on U.S. highways is **15 times greater** in one year than the total number killed in 9/11. Since the September 11, 2001, attacks, approximately 382,198 persons have been wrongly killed on U.S. highways versus 2,973 in 9/11 while the judicial and governmental response to 9/11 can be seen in every aspect of life and society. **Nothing** has been done in the area of highway safety although the misery and death outweighs those in 9/11 by 128 fold.

All Americans pay for traffic fatalities and injuries "in one way or another through higher prices for good and services, or through higher taxes." (Schults, Ruth, et al. "Disability among adults injured in motor-vehicle crashes in the United States," *Journal of Safety Research* 35 (2004), pp. 447–452).

No issue is more important than highway safety. "Recent European Union research has found that for citizens 45 years and younger, the death rate from road crashes is more than six times higher than from cancer and 14 times higher than from coronary heart disease (Care On The Road, August 1999 ([www.factbook.net]). Forty percent of fatalities are 24 years of age or under (www.factbook.net).

"Each year about 3 million U.S. residents are injured in motor vehicle crashes" (National Highway Traffic Safety Administration [NHTSA], 2003).

Crash-related injuries and death rank behind ischemic heart disease as the most costly medical condition treated in the United States (http://content.healthaffairs.org/cgi/content/abstract/21/4/105). More than 1.2 million adults were living in their homes with the disabling effects of motor-vehicle crash-related injuries in 1995 (Schults). Moreover, this number did not include those whose injuries required institutionalization and those disabled as a result of mental injuries from a motor-vehicle crash. The 1995 study interviewed 95,091 victims of motor-vehicle crashes.

According to the Federal Highway Administration's February 12, 2002, analysis, the costs is $3 million **per victim**. Children accounted for a higher share of road casualties in the UK and the USA than in other countries, for example, twice as high as that of Italy (www.factbook.net).

The **hundreds of billions** of dollars that car crashes cost could never convey the squandering of young lives and the personal holocaust they create for the victims' families. In Tucker's case, Cady was her only child and her life. Cady was supremely gifted and talented—a classical guitarist, an "exceptional" artist as noted by the curator of the local museum in a newspaper article, a budding writer, the best reader in her school, a runner whom her coach stated had extraordinary potential, had standardized test scores off the charts, and had a charismatic personality that lit up any venue she was in. To have this child **killed** because of McNair's irresponsible recklessness and then to have

the criminal-justice system and now the U.S. Supreme Court to not even acknowledge that anything wrong was done, let alone the insurmountable tragedy that it is, is more than anyone can or should bear. Tucker is not alone in her pain and anguish.

Every case in which the criminal justice system does nothing is in many respects a repetition of Tucker's case. It is totally lacking in that platitude of "justice" for the victims of car crashes to be treated as subhuman road kill. "Oh, well, that was **just an 'accident,'**" as if the word "accident" minimizes the event, because the person did not intend in a literal sense to cause the crash when the person's intentional choices, however, were the cause of the crash. As Tucker showed in her writ, the perpetrator has engaged in numerous egregious acts to have caused a fatality while driving. And then for the families to have to endure the driver to be 100% at fault, as in Tucker's case (*Tucker v. State of Montana ex rel.*, No. 08-1239 (2009), Petition for Writ of Certiorari, p. 2), but to receive not even a ticket and have **nothing** on her record that she **killed** Cady is enraging, humiliating, disrespectful, and lacks any dignity or semblance of that platitude "justice." To do this to families like us all across America—to let the offending drivers off—perpetuates a sick system. It must change. This Court has the ability to change it and must change it.

The Court's denial of the *Tucker v. State of Montana*, No. 08-1239 (2009) Petition for Writ of

Certiorari was totally erroneous, and the case must be scheduled for rehearing.

III. CONCLUSION

Tucker appeals to this Court to grant this petition for rehearing should be granted, the opinion of May 18, 2009, vacated, and the cased scheduled for argument.

Respectfully submitted,

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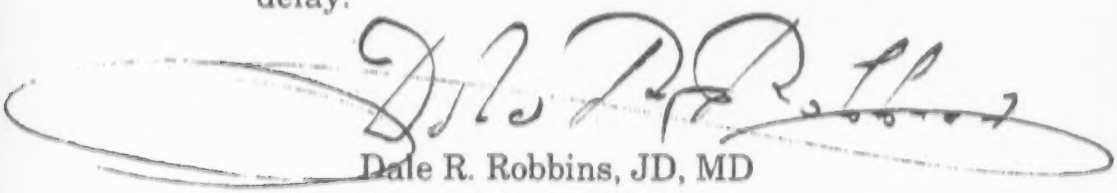
Counsel for Petitioner

June 12, 2009

CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay.



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